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Date: February 18, 2000

Case No.: 1999-ERA-17

In the Matter of

SYED M. A. HASAN
Complainant

v.

COMMONWEALTH EDISON (ComEd) and
THE ESTES GROUP
Respondents

RECOMMENDED DECISION AND ORDER

Preface

The evidence is overwhelming that Complainant was hired for a temporary work assignment at LaSalle Station Nuclear Plant, Unit 2. That he made safety concerns while so employed is not controverted. That he was cursed in front of by Mr. Rommel for not following chain of command is not an issue. However, Complainant has come forward with absolutely no evidence, except his own theory, that he was retaliated against, deprived of work or harassed while working for ComEd or that he was terminated prematurely because of the safety concerns he made. Likewise, as to two engineers that were hired subsequent to Claimant's termination, an explanation has been given as to the qualifications both had for the particular jobs for which they were hired, qualifications which Complainant did not have. In sum, the Complainant has simply failed to prove by a preponderance of the evidence that Respondents violated §211 of the Act. On the other hand, Respondents have come forward with ample

evidence to show that they had legitimate reasons for Complainant's termination and his failure to be rehired, none of which were pretextual.

Background

These proceedings arise under the employee protection provisions of the Energy Reorganization Act ("Act"), 42 U. S. C. 5851 (1992) and involve an appeal from a decision reached by the Occupational Safety and Health Administration ("OSHA") which found that Complainant's allegations of violations of the Act were without merit.

A formal hearing was held November 8, 9, 10, 1999, in Chicago, Illinois, at which time the parties were afforded full opportunity to present evidence and argument. The parties sought and were granted until January 31, 2000, to post mark post-hearing briefs. The findings and conclusions in this Decision are based upon observations of the witnesses who testified, upon an analysis of the entire record, arguments of the parties, applicable regulations, statutes and case law precedent.¹

Exhibits and Stipulations

The exhibits in this case consist of Administrative Exhibits, Complainant's exhibit and Respondents' exhibits. During the hearing, the parties stipulated that (1) Respondents are subject to the Act, (2) Complainant was an employee protected under the Act, (3) Complainant engaged in protected activity in that he voiced safety concerns, and (4) Respondents knew of Complainant's protected activities, although Estes did not know immediately.²

¹ The conclusions that follow are in part those proposed by the parties in their post-hearing proposed findings of fact, conclusions of law and order, for where I agreed with summations I adopted the statements rather than rephrasing the sentences.

² Estes was reluctant about this stipulation, noting that it had no such notice except second hand following Complainant's termination. (Tr. 37).

Issues

1. Whether Complainant has met his ultimate burden to prove that he was subjected to adverse action in the terms and conditions of his employment because he engaged in protected activity under Section 211 of the Energy Reorganization Act, 42 U.S.C. §5851 namely:

- a. Whether Complainant was subjected to unlawful harassment and discrimination while temporarily employed at LaSalle from November 1998 until March 1999 and, if so, whether such harassment was motivated by Complainant's protected activities; and
- b. Whether Complainant's release in March, 1999, from his temporary assignment at LaSalle was motivated by his protected activity; and
- c. Whether Complainant was not subsequently rehired as a result of his protected activities.³

2. Whether Respondents have stated legitimate and non-discriminatory reasons for the alleged adverse actions taken.

Findings of Fact

1. Complainant, Syed Hasan, is a civil structural engineer, with an emphasis on design engineering. The highest degree he attained is a Bachelor's degree. (CX 1). He has failed the exam necessary to become a professional engineer in the United States. During his career in the United States, Complainant has always worked as a contract employee and never directly for a utility.

2. Respondent, The Estes Group (Estes), supplies temporary personnel to nuclear power plants and other entities that work in nuclear power plants. Michael Estes is the President and Chief Executive Officer of The Estes Group.

³ The period involving rehire was confined to approximately two months, March 26, 1999 through May 17, 1999. (Tr. 28).

3. Respondent, Commonwealth Edison Company (ComEd), owns and operates the LaSalle County Station nuclear power plant. The LaSalle Station has two nuclear units, Unit 1 and Unit 2.

4. In 1996, both Units at the LaSalle Station went into extended outages. Unit 2 was in an extended refueling outage, which was known as the L2R07 outage. During a refueling outage, the unit is shutdown so that the reactor fuel can be replaced.

5. James Meister was the engineering manager for restart of Unit 2 from the L2R07 outage, Meister established the Unit 2 Engineering Restart Organization, and he headed the organization and managed three main areas within the organization: Design Engineering, headed by Frank Gogliotti; Systems Engineering, headed by Keith Taber; and Programs Engineering, headed by Pat Manning.

6. Design Engineering consists of electrical, mechanical, and structural engineering groups that work on plant modifications, plant upgrades and plant design issues. Systems Engineering addresses the performance of individual systems and monitors plant performance. Programs Engineering tests systems in the plant to make sure they meet the licensing and design requirements.

7. Meister's Unit 2 Engineering Restart Organization brought on over 300 contract (temporary) engineers to assist with the restart of Unit 2. The expectation from the most senior levels of the company was that the contractors would only work on restart issues and then would be released when the Unit 2 Engineering Organization was destaffed on or around March 31, 1999. ComEd's permanent employees would do the work thereafter.

8. One of the initial tasks of the Unit 2 Design Engineering group was to identify all of the outstanding engineering requests (ER) that needed to be completed prior to restart of Unit 2. An ER is a request for an engineering task that needs to be completed.

9. ComEd formed a group within Design Engineering, called the ER Backlog Group, to identify and work on the restart-related ERs. The restart-related ERs were assembled into an ER backlog list.

10. Jim Ray became the head of the Unit 2 ER Backlog Group. Ray is a 30-year Bechtel employee with extensive management experience and a licensed professional engineer in mechanical engineering. He too was a contract worker.

11. When Ray began working on the Unit 2 ER backlog, he expected that the assignment would end in March 1999. Ray knew that ComEd's reliance on contractors was limited to restart issues. It was common knowledge that LaSalle management intended to release the contractors when the Unit 2 work was completed.

12. Ray had approximately eight to ten individuals working for him in the Unit 2 ER Backlog Group, many of whom were contract employees. In total, the ER Backlog Group had approximately 300 ERs to close out prior to restart. (RX 11).

13. ComEd retained Sargent & Lundy to perform engineering work related to design changes that would be implemented as part of the Unit 2 restart effort. Design change packages (DCPs) were given to another group in Design Engineering headed by Frank Gogliotti and John Rommel.

14. Rommel was the mechanical lead engineer in the Design Engineering group (DCPs) during the restart effort. He is a licensed professional engineer with an expertise in mechanical and nuclear engineering. Rommel reported to Meister at all times relevant to this case.

15. In the Fall of 1998, Ray identified the need for a civil structural engineer to assist with the ER backlog. Ray anticipated that he would need a civil structural engineer to work almost full time on the ER backlog for one or two months. After that, the work would not be full time because the percentage of civil structural issues presented by the ERs was relatively small compared to the issues that were mechanical, electrical or control system related. Ray expected the civil structural engineer to assist with the Unit 2 DCPs in an overflow capacity. Meister authorized the hiring of a civil structural engineer to work only through March, 1999, and only for the purpose of working on the Unit 2 restart effort.

16. As stated earlier, Estes is a temporary employment service that supplies personnel to ComEd's nuclear power plants and other entities in the nuclear power industry. Estes does not provide labor on a permanent basis.

17. When a temporary worker's services are no longer required, the assignment ends and, simultaneously, the employment relationship between Estes and the employee ends. In other words, Estes does not keep a temporary assignment employee on its payroll after the assignment with the client is concluded.

18. It is standard practice for Estes staff to advise temporary staff employees that the duration of employment ends with the termination of the assignment.

19. Estes does not participate in the determination of when an assignment ends, nor does Estes participate in the day to day management of an assignee. Specifically, Estes does not participate in, or recommend, the release of any individual from an assignment.

20. In 1998, Estes received a Professional Staff Augmentation form (PSA) from ComEd for a civil engineer for the restart of Unit 2. (RX 9). This was the first time Estes had received a request for a civil design engineer to do civil engineering work. The PSA named a preferred candidate for the job, John Holliday, and indicated that the assignment would last from the end of October, 1998, to March 31, 1999. (RX 9).

21. Since the preferred candidate was unavailable, and based on his qualifications as a structural pipe engineer (Estes EX 2), Complainant was employed by Estes to begin working on November 9, 1998, in response to ComEd's request for a design engineer. (Estes EX 4).

22. Estes employed Complainant on a temporary basis, placing him with ComEd to fill a slot requested under a PSA issued by ComEd to Estes. (Estes EX 3). His hire letter stated that his start date was November 9, 1998, and that the duration of his employment was the "term of the assignment" at the ComEd facility. This was the sole provision for employment duration and there was no other reference in the hire letter to the length of Complainant's employment. (Estes EX 4).

23. Complainant's assignment at LaSalle began on November 9, 1998. He was hired to provide civil structural engineering support to Ray's Unit 2 ER Backlog Group. Jim Ray, Complainant's immediate boss, informed Complainant that in addition to working on the Unit 2 ER backlog, he would perform some restart-related review work for another Design Engineering group in an overflow capacity.

24. At the time Complainant was hired none of his supervisors or ComEd management had heard of or previously met Complainant.

25. Complainant knew he was hired for the Unit 2 restart effort. He knew that the work for the Unit 2 ER Backlog Group needed to be completed prior to restart.

26. Complainant knew that his assignment was a temporary one and he did not expect to be employed at LaSalle permanently. In keeping with that expectation, he rented a motel room near LaSalle Station on a month-to-month basis. He never looked for an apartment in Illinois. Complainant kept his family and home in Alabama where he permanently resides.

27. Thomas Bandura, a 29-year ComEd employee, is the Administrator of the Employee Concerns Program (ECP) at LaSalle. The ECP at LaSalle serves as an alternate path for employees to raise safety concerns. Employees may contact the ECP with a wide range of concerns. (CX 13, RX 5).

28. As part of his employment at LaSalle, Complainant received training, which included training on raising safety concerns. He listened to two lecturers whom he deemed "very brilliant."

29. Estes also required that its employees, including Complainant, attend an orientation session regarding the ECP at LaSalle. (CX 7). Mr. Bandura met with Complainant to provide him with training on the ECP. Bandura told Complainant that he was free to raise safety concerns and he encouraged Complainant to come to him if Complainant had any concerns. Bandura also told Complainant that he could raise issues with the NRC.

30. Bandura also trained Complainant on the use of Problem Identification Forms (PIF). ComEd expects employees to identify concerns and it relies on the PIF as a process to capture and respond to issues raised by employees. Once an employee documents a concern on a PIF, the PIF is given to the senior operating licensee on shift for his or her review to determine if the issue created a true operability concern which would require the plant to be shut down immediately. Within 24 hours a team of senior managers, including the station manager, meets to review the PIF's filed to assess the significance of the issue raised.

31. Jeffrey Benjamin, the Site Vice President and highest ranking officer at LaSalle, regularly communicates his expectations regarding the freedom of employees to raise safety issues through face-to-face daily interactions with employees and through group communications.

32. In October 1998, Benjamin drafted ComEd's *Policy for Addressing Safety Issues*, NOP-OA.43. (RX 3). The Policy describes the various avenues through which concerns can be raised and clearly states that harassment, intimidation, retaliation or discrimination against employees who raise concerns would be contrary to the policy and would not be tolerated. (RX 3). The Policy was distributed to the Vice Presidents in the Nuclear Generation Group and was in place while Complainant worked at LaSalle.

33. In a January 7 memo, which Complainant received, Benjamin explained that all workers, meaning ComEd employees and contractors alike, have a duty to raise safety concerns. He reiterated the many ways in which employees may raise concerns: through the PIF process, with the head of the employee's department, or with any member of the management team, including Benjamin. Benjamin also advised that employees could raise issues through the ECP or bring an issue to the attention of the NRC at any time. (CX 13; RX 5).

34. In addition to working on the ER backlog, Complainant provided overflow assistance to the DCP Group by reviewing various calculations related to the DCPs for restart. This task was called an "owner's review."

35. In early January, Complainant performed an owner's review of calculation L-002291, a pipe support calculation that had been originated by Sargent & Lundy. At the time, Complainant did not inform anyone at ComEd that he had a pending Section 211 suit against Sargent & Lundy. In reviewing that calculation, Complainant became concerned that the pipe support connection had been modeled as a hinged connection, whereas Complainant thought it should have been modeled as fixed.

36. Complainant raised this issue with several persons at ComEd. He first expressed his concern to Jim Ray, who told Complainant that if he thought there was an issue he should document it. Ray also suggested that Complainant discuss the issue with another civil structural engineer. Complainant thought Ray was very helpful.

37. Jim Ray, Complainant, and another individual discussed the issue with Frank Gogliotti, the electrical lead and the supervisor for the Unit 2 Restart Design Engineering Group. Gogliotti is a licensed professional engineer with an expertise in electrical engineering. Complainant explained his concern to Gogliotti. Gogliotti advised Complainant to discuss the issue further with the Sargent & Lundy contractors responsible for the calculation.

38. Around January 11, 1999, Complainant also discussed the issue with John Rommel. Rommel invited Complainant and Hagen, the Sargent & Lundy lead engineer responsible for the calculation, to come to his office to discuss the issue. By the end of the meeting, the resolution path was for Complainant and Hagen to sit down and attempt to reach a consensus on the issue. Rommel also told Complainant that if he was not satisfied with the response from Sargent & Lundy, then they would contact Bill Hilton, the most experienced ComEd structural engineer on site, for his advice.

39. Complainant met with Sean Hagen, they had a difference of opinion. Complainant then discussed the issue with Hilton. Complainant respected Hilton and found him to be “very supportive.”

40. Rommel met with Complainant several times on the modeling issue. During one meeting, Complainant stated that he could not trust Hilton because Hilton previously had worked for Sargent & Lundy. Rommel told Complainant that if he was not satisfied with Hilton’s help he would elevate the issue to Roger Gavankar, who was the Chief Design Engineer for ComEd. Complainant seemed satisfied with this approach.

41. Around January 13, 1999, Complainant decided to write a PIF on the issue. With the assistance of Jim Borm, a ComEd engineer assigned to the ER Backlog Group, Complainant began to write the PIF. As they were writing the PIF, Borm paged Gogliotti for Complainant so that Complainant could notify Gogliotti that he was writing a PIF on the issue. Complainant was pleased with Borm’s assistance, including the fact Borm helped him contact Gogliotti.

42. In response to the page, Gogliotti advised Complainant that he should gather information from Sargent & Lundy prior to generating a PIF. Gogliotti told Complainant this because he believed it more effective to have all the information when writing a PIF, rather than writing a PIF without the information to back it up.

Complainant did not believe that Gogliotti was trying to suppress the issue, and on January 13, 1999, Complainant sent an e-mail to Gogliotti confirming that he was not writing a PIF and documenting the issue in the e-mail instead.

43. On January 14, 1999, Complainant hand-delivered a copy of the e-mail he had sent to Gogliotti to Jim Ray and to Ed Connell, who was the Design Engineering lead for Unit 1. Complainant never explained the issue to Connell nor spoke to Connell about it.

44. Subsequently, while Complainant was discussing the e-mail with Ray, Rommel entered Ray's office. Rommel had received a copy of the e-mail from Connell who told Rommel to look into the issue. Rommel was upset by the e-mail because he thought it implied that Rommel was not trying to solve the issue. Rommel asked Complainant why the "f—" he had given the e-mail to Connell because Rommel thought that he and Complainant had agreed to a resolution path and sending the e-mail to Connell suggested that Rommel had not addressed the issue.

45. Rommel never said that he was upset that Complainant had raised the issue and Complainant understood that Rommel's frustration was directed toward his having given the e-mail to Connell. It was the only time Rommel or anyone else at ComEd used offensive language toward Complainant.

46. Within the hour, Rommel realized that his behavior was unprofessional. He looked for Complainant to apologize to him, and when he did not find him, he left a note at Complainant's desk that said, "Syed: Please page/call me @2042. I would like to apologize for my overreaction. Sorry. Thanks. John Rommel." (RX 40). Rommel later saw Complainant and apologized in person. He also told his supervisor, Jim Meister, about his loss of temper.

47. On the same day as the e-mail episode, January 14, 1999, Complainant also called Jeffrey Benjamin's office. Benjamin's secretary promptly notified Benjamin, who was attending an Executive Management meeting with several executives from ComEd's corporate offices. Benjamin left the meeting to meet with Complainant. He did so because he had committed to being responsive to employee concerns.

48. During an hour-long meeting with Benjamin, Complainant explained the issue regarding the pipe supports to Benjamin as well as the conversations he had had

regarding the issue with Ray, Gogliotti, Rommel, Hagen, Hilton, and others. Benjamin took notes and asked Complainant to draw the pipe support to demonstrate the issue regarding the hinged versus rigid connection. According to Complainant, Benjamin was very interested in what Complainant discussed with him, acted professionally, and sincerely tried to assist Complainant. Benjamin told Complainant that he had done the right thing by escalating the issue to Connell and affirmed that writing a PIF is the proper way to address the issue.

49. After his meeting with Complainant, Benjamin paged Meister and told Meister that he wanted to make sure the pipe support issue was addressed expeditiously. Benjamin also wanted to verify whether Complainant's conversation with Rommel had occurred, and, if so, he instructed Meister to take immediate corrective action.

50. Meister located Complainant and invited him to his office to discuss the pipe modeling issue. Meister also paged Roger Gavankar, then the Chief Design Engineer for all of the nuclear plants at ComEd. Gavankar is a licensed professional engineer in civil structural and nuclear engineering. As the Chief Design Engineer for ComEd, Gavankar interfaced with the individual nuclear power plant sites on ComEd guidance, policies, oversight and review. Gavankar's office is in Downer's Grove, and he does not supervise anyone at the sites and no one from the sites reports directly to him. He supervises 20 engineering specialists at ComEd's corporate headquarters. Gavankar is now a Senior Chief Engineer for ComEd. Gavankar drove to LaSalle to meet with Complainant that same day, and he asked two of his engineering specialists to join him.

51. Complainant and Gavankar met for three hours. They agreed that a joint is never fully fixed or hinged. When Gavankar asked Complainant for his opinion, Complainant recommended using a semi-rigid modeling assumption. Gavankar agreed to do this. However, Complainant also asked Gavankar to develop standards on the modeling of pipe supports, and Gavankar explained that the issue did not lend itself to standardized instructions because it is difficult to create a standard to cover every potential type of situation.

52. The same day, Meister held a meeting with his engineering managers and supervisors to reinforce ComEd's expectation to use appropriate language with employees, and to encourage employees to raise safety concerns. He also spoke with

Rommel privately to counsel him on his inappropriate interface and language with Complainant earlier that day.

53. Meister also followed up with Gogliotti to ask him why he had advised Complainant not to write a PIF. Gogliotti explained that because this was a technical issue he had been encouraging Complainant to work with Sargent & Lundy to resolve the concern, and he was not sure that Complainant had gathered sufficient technical information from Sargent & Lundy. Regardless, Meister told Gogliotti to make sure that the PIF was written and placed into the system.

54. Meister reported back to Benjamin that he had people addressing the technical issue raised by Complainant. He also advised that he had taken immediate corrective action, including meeting with his management team on the proper way to conduct themselves to encourage the raising of concerns.

55. Late on January 14, 1999, Complainant, Meister, Gavankar, and Gavankar's engineering specialists met to discuss the issue further, agree to a resolution path, and to debrief Meister. During the early evening meeting on January 14, Complainant explained that he believed a change in the pipe support analysis could salvage the calculation without any physical modifications to the pipe support or plant. A resolution path was agreed to at the meeting. A new calculation, L-002379, would be originated by Sargent & Lundy based on Complainant's recommendation to use a semi-rigid modeling assumption. (RX 19).

56. Complainant expressed that he hoped he would not be discriminated against in retaliation for raising the pipe support issue, and Meister assured Complainant that he would not be retaliated against, and that ComEd expects both its employees and contractors to raise concerns. He also told Complainant that the Unit 2 restart work was winding down and that the contractors would be released as ComEd completed the restart project. He said Complainant should not be surprised when he was released. Complainant said he wanted to continue doing review work as long as he could, and Meister and Gavankar assured Complainant that he would continue as a reviewer.

57. Complainant had also contacted Bandura in the ECP on January 14, 1999, regarding the policy on writing PIFs. Bandura told Complainant he should document issues through the PIF process.

58. Complainant also told Bandura that he thought he had been harassed by John Rommel's use of the "f" word. This was the first time Bandura had received an allegation of discrimination for raising a safety concern, and he accepted Complainant's allegation at "face value."

59. Bandura promptly contacted Meister to discuss Complainant's allegation. Meister promised to look into it. He later reported back to Bandura that he had held a meeting to discuss proper treatment of employees to maintain an environment in which employees feel free to raise safety concerns. Bandura was satisfied by Meister's response.

60. Complainant wrote his PIF on the pipe support modeling issue, (RX 67), and by the end of the day on January 14, 1999, Complainant was satisfied that ComEd had done everything he thought they should toward resolving the issue he had raised.

61. Within 24 hours of Complainant's raising the pipe support modeling issue on January 14, 1999, Meister informed the NRC resident inspector of the issue. It is also ComEd's practice to provide the NRC with a copy of all PIFs, usually within one day of being initiated.

62. On January 23, 1999, Meister also sent a detailed e-mail to individuals involved with the pipe support modeling issue, which outlined six actions ComEd had committed to do in response to Complainant's concern. Complainant received a copy of the e-mail. (RX 22). Complainant was encouraged by ComEd's prompt response and he appreciated being kept informed.

63. On January 25, 1999, Benjamin wrote a letter to Complainant in which he thanked Complainant for raising the pipe support calculation issue. Benjamin wrote, "[n]othing is more important than identifying issues and bringing them to the forefront. I also want to reinforce that bringing the issue directly to my attention was appropriate." (RX 7). Complainant appreciated the letter from Benjamin.

64. ComEd has established processes for addressing technical issues. The individual who raises the concern will be involved to the extent that ComEd assures an understanding of the issue. The individual is not necessarily involved in the resolution, however, because an issue arising under a PIF will be assigned to the appropriate group with expertise to handle the issue. This procedure is necessitated by the 4,000 to 5,000

PIFs written at LaSalle each year. To have each individual who writes a PIF also responsible for its resolution would render plant operations dysfunctional. Nonetheless, the person who writes a PIF is kept informed of its resolution.

65. From January 14, 1999, until Complainant's departure on March 26, 1999, ComEd kept Complainant informed of the progress in resolving the issue he raised. Complainant continued to perform the owner's review on the calculation that gave rise to his concern (L-002291) and was assigned to review Sargent & Lundy's new calculation (L-002379). ComEd also expected Complainant to continue performing the tasks for which he had been hired.

66. On January 21, 1999, Gavankar issued a policy statement regarding the acceptable practice for evaluation of pipe supports. (RX 42). Gavankar prepared the statement in response to Complainant's concern and as a reminder that when evaluating pipe supports, the assumptions must be documented. Gavankar provided Complainant with a copy of the policy statement.

67. Complainant appreciated being kept involved, but nonetheless Complainant complained to Bandura that Bohlke did not involve Complainant in reviewing the work performed by Sargent & Lundy. Bandura explained to Complainant that ComEd has a set method for resolving concerns.

68. On March 20, 1999, a Saturday, Gavankar called Complainant at his motel room to update him on ComEd's progress on the modeling issue, and to see if he had written a PIF on another potential pipe support issue. Gavankar's notes, written the same day, summarize the conversation. (RX 47). Complainant confirmed to Gavankar that no new issue had been found.

69. Complainant then repeated an earlier allegation that Gavankar had threatened to remove him from review work. Gavankar again explained that he had not threatened to remove Complainant, but that because of a difference of professional opinion between Complainant and Sargent & Lundy, Gavankar had decided to have the modeling issue reviewed by an independent third party, Dr. du Bouchet. Complainant agreed that it was the plan all along to involve an independent consultant. (RX 19, RX 47).

70. On March 24, 1999, Gavankar provided Complainant with a copy of Sargent & Lundy's report resolving the issue for his review and comment. (RX 50). Although Hasan asked for the calculation on which the report was based, Gavankar did not have it with him because it was being reviewed by the ComEd team. Raytheon and Stone & Webster, the two outside engineering companies that Gavankar asked to review the report, did not review the calculation either. Gavankar saw no need for Complainant to review the calculation.

71. Complainant met with every official at ComEd whom he wanted to meet with to discuss the pipe support modeling issue; no one at ComEd ever refused to meet with Complainant to discuss the issue. Complainant also knew that he was free to contact the NRC at any time, and no one at ComEd ever discouraged Complainant from contacting the NRC.

72. Although Complainant claimed that on January 14, 1999, and again in early February, 1999, Gavankar told Complainant either that review work would be taken away from him or not given to him, such remarks are not supported by the record. Complainant could not remember Gavankar's words, and Complainant's deposition testimony contradicted his trial testimony. Complainant admitted Gavankar may have said that he was not taking any review work away from Complainant. Complainant also knew by the end of the meeting on January 14, 1999, he would continue as reviewer. Gavankar denied ever making such comments about removing Complainant from current or future review work, and Jim Meister supported Gavankar's denial.

73. Complainant continued to perform calculation review work in January and February. Complainant completed an owner's review of calculation L-002382 on January 28, 1999. (RX 15). On February 20, 1999, Complainant completed an owner's review of and signed off on calculation L-002291, the calculation in which he had initially identified the modeling issue. (RX 16). The same day, he also signed off on calculation L-002379, the calculation that responded to Complainant's recommendation to use a semi-rigid connection instead of a hinged connection with the pipe supports. (RX 17). As of March 1, 1999, there was essentially no review work related to restart that needed to be done. Meister never knew of any review work that was taken away from Complainant.

74. Also, despite his allegations, Complainant conceded that Gavankar never took any review work away from him. According to Complainant, his work load never

decreased after the January 14, 1999, meeting. He continued to work the same number of hours he always had.

75. In February 1999, Complainant inquired of Ray if he could work on some ERs related to pipe supports. Ray explained to Complainant that the work was under control and that there was no need to involve someone else as the work was almost completed. These ERs were finished around March 1, 1999.

76. Complainant claimed that when he was in the cafeteria during the first week of his employment at LaSalle, two individuals commented that Complainant would be "in trouble" if he wrote a PIF. Complainant could not identify these individuals and he never informed anyone in supervision or management of the incident.

77. Complainant also claimed that in December, 1998, before he raised any concern about the pipe support modeling, a ComEd engineer by the name of Bimal Desai called Complainant a "whistleblower." Prior to working at LaSalle, Complainant had never met Desai and had never worked with him. Desai did not supervise Complainant, he never assigned work to Complainant, and never took any work away from Complainant. Complainant did not tell anyone in ComEd management or Ray, his immediate boss, that Desai had made these comments. He first mentioned the allegation to Bandura during his exit interview on March 25, 1999. Bandura never substantiated Complainant's claims of harassment by his peers.

78. Complainant's single allegation of harassment by Rommel is limited to the five-minute conversation on January 14, 1999, where the "f" word was used. After that conversation, Rommel never acted inappropriately toward Complainant. The incident did not affect the quality of Complainant's work nor impair his livelihood in any way. The conversation was simply a result of Rommel's loss of temper because Complainant failed to follow chain of command protocol. Nonetheless, ComEd took comprehensive corrective action. (RX 48).

79. In late January or early February, Complainant also told Jim Ray on two different occasions that co-workers had come by his desk and made snide remarks. Complainant could not identify the co-workers. Ray immediately took Complainant into the work area and asked him to identify who had made the comments. Complainant failed to identify his alleged harassers. Ray told Complainant to notify him immediately

the next time any comments were made so that Complainant could point out the alleged harassers and Ray could address the issue. Complainant never did.

80. The destaffing of the Unit 2 Restart Organization Engineering was expected from the time that ComEd started planning the staffing of the restart organization. Benjamin communicated that expectation to his managers that contractors would be released when their work was completed and the restart criteria were satisfied.

81. The 300 Unit 2 Backlog ERs that were outstanding in October 1998 were all completed as of March 19, 1999. (RX 11). The DCPs relating to the design changes for Unit 2 restart, some of which contained calculations that Complainant reviewed, were all closed out by February 1. (RX-12, RX-14, RX-14). As of February 1 there was no overflow calculation review work to be completed because the DCPs were completed by that date.

82. The weekly report for the week of March 22, 1999, showed a net reduction of 11 engineering contractors on the L2R07 projects as of the week of March 15, 1999. (RX 26). The subsequent weekly reports showed a net reduction in contractor staff for the L2R07 project as follows: 37 contractors released the week of March 22; 31 contractors released the week of March 29; 44 contractors released the week of April 5; 88 contractors released the week of April 12; 14 contractors released the week of April 19; 21 contractors released the week of April 26; 7 contractors released the week of May 3; and 29 released the week of May 10. (RX 26, RX 35).

83. As early as January, 1999, Meister had asked all of his supervisors and managers to prepare lists of the contract employees in their groups, along with an estimate of when the group work would be completed, so that ComEd could plan when to release the contractors. In response, Ray prepared a list for the ER Backlog Group in which he estimated that their work would be completed by the end of March 1999. This meant that the contract employees in his group, including Complainant, could be released then as well.

84. In February 1999, Benjamin and Meister began meeting weekly to discuss destaffing. At these meetings, they reviewed staffing curves related to the restart organization. Benjamin instructed his staff to accelerate the destaffing because the completion of the restart project was accelerating.

85. In early March, Ray learned from ComEd management that the contractors in the ER Backlog Group would be released on March 26, 1999. He then told Complainant, along with the entire group, that their last day would be March 26, 1999, because the work in the group had been completed. Gogliotti also met with all of the contract employees in the group to reiterate that their last day would be March 26, 1999, and to thank them for their service. Complainant did not complain about his release.

86. Complainant told Gogliotti that he had outstanding non-critical Unit 1 work to be completed. This work was not required for the restart of Unit 2 and there was no authorization to retain a contractor to work on this non-critical Unit 1 work. Gogliotti told Complainant to give the Unit 1 work to ComEd employee Jim Borm. Ray told Complainant that ComEd had budgeted to release the contractors as restart was achieved. Ray did not recommend that any contractors be kept on, and ComEd did not ask Ray for any recommendations. Ray himself was subsequently released.

87. As expected, the Unit 2 ER Backlog Group, of which Complainant was a part, completed its work in March, 1999; and as a result, the contract engineers in the ER Backlog Group - Complainant, Larry Klein, Maurice LaForrest, Mohammed Hyder, and Ed O'Hare - were released on March 26, 1999, because the work for the Unit 2 ER Backlog Group was completed. Jim Ray, Complainant's supervisor, was released one week later on April 2, 1999. (RX 39). ComEd restarted Unit 2 on April 11, 1999, which was 50 days earlier than the original June 1 projected restart date.

88. Estes did not participate in this determination or release, and, as was standard practice, Estes terminated Complainant's employment concurrent with his release on March 26, 1999.

89. By letter dated April 8, 1999, the Occupational Safety and Health Administration gave notice to Estes of a complaint filed by Complainant (CX-9). This was the first notice Estes had that Complainant had raised concerns about the pipe support calculations at ComEd; Complainant had never expressed any concerns to Estes.

90. Based on a discussion with Frank Gogliotti at ComEd, Estes, in responding to the complaint, advised OSHA on April 16, 1999, that it was Estes' understanding

the issues Complainant had raised with ComEd had been promptly reviewed and resolved. (CX 9).

91. Estes never discussed Complainant with ComEd during the time that Complainant was assigned at LaSalle. Estes also never discussed Complainant's lawsuit with any of his subcontractors or other clients.

92. Subsequently, on April 22, 1999, ComEd's LaSalle Station issued PSA LHC-RLV-248A to Estes, requesting Collin Andersen to provide services as a scheduler/scheduler analyst. (Estes EX 8).

93. The PSA specifically required experience, through the use of computer software, in scheduling systems and report writing. Knowledge and experience in Project View were "mandatory." (Estes Ex. 8).

94. Collin Anderson had about seven years in scheduling of engineering, procurement, and construction projects. His most recent experience was at ComEd, beginning in January 1997, and continuing well into 1998. He also had expertise in Project View. (Estes EX 9). Complainant had no experience in scheduling, and no experience in the Project View program. (Estes Ex. 2).

95. In responding to this PSA, Estes considered only Andersen and did not consider any other engineer, including Complainant.

96. Based on the specific request for Andersen, and Estes's assessment that his background as a scheduler made Andersen a top-rated choice, Estes placed Andersen with ComEd to start April 22, 1999. (Estes Ex. 9).

97. On May 4, 1999, ComEd's LaSalle Station submitted to Estes, Managed Task Services Form LSC-RLV-247MT requesting that Estes provide managed task services. ComEd required personnel "currently trained to LaSalle specific processes and procedures with system engineering experience." ComEd specifically requested that Lee Grzeck be given this managed task assignment as a project manager. (Estes Ex. 10).

98. Estes thereafter placed Grzeck into this assignment without considering any other engineering, including Complainant. Although, Complainant, like Grzeck, was

a civil structural engineer, Grzeck had an MBA and extensive experience as a project manager in the system engineering environment. He had sixteen years experience in the nuclear power industry. From 1992 to 1997 he was project manager for Carolina Light & Power, then worked at ComEd beginning 1997. (Estes Ex. 11). Complainant's experience was almost completely that of a structural engineer, with only some experience in the 1980's as a group leader.

99. Also, the task was conceived by Grzeck himself and he was the logical choice; and inasmuch as he was already engaged in work at ComEd, this assignment represented a continuation of his work there, rather than an occasion to bring him back to the facility.

100. Estes also did not submit Complainant's resume to ComEd after March 26, 1999, because ComEd never asked Estes to supply a civil structural design engineer. Estes also did not receive any requests to place any civil structural design engineers at any other nuclear facility from March 26, 1999, to May 17, 1999.

Conclusions of Law

I.

Complainant has not met his burden of proof by showing protected activity was a contributing factor in his termination.

Respondent ComEd has articulated a legitimate, non-discriminatory basis for terminating Complainant's employment on March 26, 1999, and Respondent Estes has proven by clear and convincing evidence that it had no notice of Complainant's protected activity prior to his termination.

Complainant has the burden of proof to demonstrate by a preponderance of the evidence that he engaged in protected activity and that activity contributed to adverse action being taken against him by Respondents. This Complainant has not met his burden of proof by showing the protected activity on his part in any way contributed to the termination of his temporary employment. To the contrary, Respondent ComEd has demonstrated that Complainant's termination, along with many other contract employees, was a legitimate, non-discriminatory business decision.

Complainant was brought on the assignment at ComEd's LaSalle Nuclear Station in November, 1998, for a limited term. This was understood by everyone involved. He was released as the restart of the Unit upon which he had been working neared. The tasks were turned over to ComEd's full time employees. To have kept unnecessary temporary employees beyond that period would have been a poor business decision.

In sum, Complainant has offered not one scintilla of evidence that Respondent ComEd's proffered legitimate, non-discriminatory business reason for his termination was in any manner a pretext for discrimination. Admittedly, a retaliation motive may be established or proven by circumstantial evidence, but in this instance Complainant has not provided such evidence. He was hired for a temporary assignment and released when the assignment was completed.

As to Estes, the evidence is without contradiction that this Respondent knew nothing of Complainant's protected activity until sometime later than his March 26, 1999, termination by ComEd.

Once placed with ComEd in November, 1998, Estes' President, Mike Estes, explained, without contradiction, that Estes had no supervision or control over Complainant. Likewise, when Complainant's assignment ended with ComEd his employment with Estes, the placement agency, automatically terminated. This is the normal practice in the trade, and Complainant has established no discrimination against him on the part of Estes by not maintaining him on Estes payroll beyond March 26, 1999. Complainant was no longer working for ComEd after March 26, 1999, his assignment there had ended and so had his pay check. It is absurd to suggest that Estes should have generously continued Complainant on a salary basis. Estes' ability to pay a salary was derived from revenues generated from the borrowing employer (ComEd), and when that source ceased so did Estes' ability to meet payroll.

Complainant knew very well when he took the assignment in November, 1998, that the assignment was temporary and would end sometime in the first or second quarter of 1999. Complainant made no permanent move to the Chicago area when he took the job, but simply rented a motel room and left his family at his residence in Alabama. The fact there might at one time have been speculation the project could run as late as June, 1999, is irrelevant. Complainant acknowledged that he had been guaranteed nothing. The record is replete with evidence that the project ended well

ahead of schedule and that the layoff of temporary contract employees came in mass in late March and early April.

In sum, protected activity or not, Complainant has failed to prove he was in any manner singled out for the reduction in force that came as a normal occurrence of the completion of the tasks for which he had been hired.

II.

Complainant has failed to establish harassment by either management or co-workers under Section 211 of the Act.

John Rommel's use of the "f" word is not an actionable offense. It was an isolated event occurring over two months prior to Complainant's termination and for which Complainant received an apology and Mr. Rommel received a remand and counseling.

Complainant testified the event had no impact on his job performance, and he never sought medical treatment as a result of the instance. More importantly, the unrefuted testimony is that the episode occurred not because of any protected activity on Complainant's part, but rather because of Mr. Rommel's frustration over Complainant's ignoring the chain of command and involving Ed Connell. Neither was the described exchange severe enough to detrimentally affect a reasonable person.

As to harassment by Bimal Desai, unnamed co-workers in the cafeteria and unnamed co-workers in Complainant's work area, all of which were isolated occurrences, there is no evidence which suggests the Respondents encouraged or orchestrated the comments.

The alleged instance in the cafeteria occurred during Complainant's first week at work, prior to any protected activity on his part, and was never reported to management. The same can be said about any comments Complainant may have overheard from Mr. Desai, a man Complainant never met, during December, 1998. As to the unidentified individuals who allegedly made comments near Complainant's desk, when he notified Jim Ray, Mr. Ray responded swiftly attempting without success to learn the identity of the co-workers. None of these people were alleged to be in a supervisory role or involved in Complainant's ultimate release.

Complainant also contends that Mr. Gavankar twice threatened to remove him from review work. Such an event was denied by Mr. Gavankar, and there is no evidence in the record to support the fact that Complainant did not remain assigned to review work as long as the work remained available. Every witness who testified about this issue supported Mr. Gavankar's testimony that he never took an assignment away from Complainant.

Granted, Complainant while kept advised about progress being made on his pipe support concerns was not assigned to remedy the concerns; however, Mr. Benjamin, the site Vice President at LaSalle, explained in his testimony that LaSalle receives over 4,000 PIFs per year and each person who completes a PIF does not become involved with the resolution of the problem. Complainant was hired for other tasks and the resolution of his pipe support concerns was assigned to others who possessed expertise about the problem.

III.

Respondents' have articulated with clear and convincing evidence a legitimate and non-discriminatory basis for not rehiring Complainant in April or May, 1999.

Complainant has presented no evidence that he applied for either position or was qualified for either position. To the contrary, both men hired, Messrs. Andersen and Grzeck, were specifically requested of Estes by ComEd because of unique qualifications which Complainant specifically did not possess.

Mr. Andersen was sought by ComEd because he had substantial experience as a scheduler. Complainant possessed no such qualifications. Mr. Grzeck was a systems engineer with supervisory experience. Complainant had no such experience. Also, Mr. Grzeck had conceived the very task at ComEd for which he was hired.

IV.

Complainant has failed by a preponderance of the evidence to prove that either Respondent violated Section 211 of the Act.

Complainant is a civil engineer who was hired for an assignment in the Engineering Request Backlog Group, a group organized specifically to assist in the Unite 2 restart. That Group was tasked with closing out outstanding Engineering Requests (“ER”) prior to restart. Consistent with expectation that this assignment was temporary employment, the ER Backlog Group was scheduled to be disbanded when the work was complete. Complainant was also expected to assist with overflow design review work while he was assigned to the ER Backlog Group, which work also was to be completed prior to restart.

Consistent with ComEd’s expectations when Complainant was hired, the ER Backlog Group completed the ER backlog toward the end of March 1999. The design review work also ended in the first quarter of 1999. Thus, on March 26, 1999, the ER Group was disbanded and contract engineers in the ER Group were released. Complainant was one of the contract employees released that day. Overall, Complainant was one of hundreds of contract employees released as the work necessary for restart of Unit 2 came to a close. Complainant’s release was not discriminatory.

Neither has Complainant proven he was harassed and discriminated against while he worked at LaSalle for expressing concerns. The evidence shows that while Complainant asserted during his employment that he was denied fair treatment, management continuously assured that no such discriminatory treatment occurred and that any alleged harassment or discrimination was promptly addressed. Likewise, the evidence shows that the two subsequent rehires which occurred in April, 1999, and May, 1999, were legitimate and involved positions for which Complainant was unqualified.

RECOMMENDED ORDER

It is my recommendation that Respondents should prevail in this case and that Complainant's complaint should be dismissed.

SO ORDERED this ____ day of February, 2000, at Metairie, Louisiana.

C. RICHARD AVERY
Administrative Law Judge

CRA:kw

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C. F. R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Avenue, N. W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C. F. R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).